IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 97-12960
GOLDBERG BROS., INC.	)	
RICHMOND RECYCLING, INC.	)	
	)	
Debtors	)	FILED
	)	at 9 O'clock & 43 min. A.M.
	)	Date: 9-13-01
Scott J. Klosinski, Trustee for	)	
Goldberg Bros., Inc. and	)	
Richmond Recycling, Inc.	)	
	)	
Plaintiff	)	
	)	
V.	)	
	)	Adversary Proceeding
Accelerated Benefits Corporation,	)	Number 99-01020A
First Defendant,	)	
American Title Company of Orlando	)	
Second Defendant,	)	
Valley Forge Life Insurance,	)	
Third Defendant,	)	
Benefits America, N.A., Inc.,	)	
Fourth Defendant.	)	

ORDER

By motion for partial summary judgment, the Chapter 7 Trustee ("Trustee") seeks to avoid two post-petition transfers of property of the estate pursuant to 11 U.S.C. §549[1]. By motion, the

[1]11 U.S.C. §549 states in pertinent part:

(a) Except as provided in subsection (b) or

Trustee also seeks to add sixty-nine investors as indispensable parties to the remaining liability issue under 11 U.S.C. §550[2]. By motions to dismiss, Benefits America, N.A., Inc.("BA"), Accelerated Benefits Corporation ("ABC")and American Title Company of Orlando ("ATCO") (collectively "Defendants") seek to dismiss the Trustee's complaint for failure to join indispensable parties. Because the sixty-nine investors are not indispensable parties, the Defendants' motions to dismiss are denied and the Trustee's motion to add parties is also denied. The Trustee is entitled to partial summary judgment as the transfers are avoidable transfers as defined in

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> (c) of this section, the trustee may avoid a transfer of property of the estate--
> (1) that occurs after the commencement of the case; and
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
> (B) that is not authorized under this title or by the court.

[2]11 U.S.C. §550 states in pertinent part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> (2) any immediate or mediate transferee of such initial transferee.

§549.

Also pending is a summary judgment motion filed by BA averring that it did not receive any property of the estate in these transfers and that disgorgement of its fees would be an unjust windfall to the Debtors' Chapter 7 estates. Because material facts are in dispute as to whom BA represented, summary judgment is denied.

The facts are as follows. On October 28, 1997, Richmond Recycling, Inc. and Goldberg Brothers, Inc. ("Debtors") filed separate voluntary Chapter 11 cases. The bankruptcy cases were consolidated and were converted to a Chapter 7 on June 26, 1998. A trustee was appointed on July 17, 1998. The trustee filed this adversary on March 19, 1999 to avoid two post petition transfers of life insurance policies.

The trustee seeks to avoid the following post-petition transfers:

1. A November 15, 1997 agreement to transfer from Goldberg Brothers, Inc. to Accelerated Benefits Corporation a life insurance policy,#22007655, insuring the life of Phillip Goldberg and the subsequent assignment of the policy to American Title Company of Orlando, Trustee, named beneficiary. (hereinafter "Goldberg policy")

2. A January 23, 1998 agreement to transfer from Richmond Recycling, Inc. to Accelerated Benefits Corporation a life insurance policy,

#88002007, insuring the life of Phillip Goldberg and the subsequent assignment to American Title Company of Orlando, Trustee, FBO Accelerated Benefits Corporation.(hereinafter "Richmond policy").

The transfers were part of a viatical settlement agreement. These settlements involve the purchasing of life insurance policies from the owners of the policies, the so-called "viators." The insurance policies insure the lives of people ("insureds") who have been diagnosed as having a terminal, catastrophic, and/or life threatening illness. ABC is a company in the viatical settlement business. ABC buys insurance policies of terminally ill people. ABC enters into viatical settlement purchase agreements with investors interested in purchasing policies with a particular life expectancy of the insured. The criteria in the transactions at issue was a life expectancy of two years or less. Affidavit of Jess LaMonda, president of ABC. The value of the policies is not revealed to the investors and ABC is paid a fee from the difference between the death benefits (less transaction costs) and the purchase price (investment funds). Aff. of Jess LaMonda. The viatical settlement purchase agreements state "Whereas: ABC is a company whose principal business activity is that of identifying, qualifying and purchasing, as an agent for purchasers, one or more life insurance policies (and relate death benefits), or one or more portions of a life insurance policy or set of life insurance

policies ("Policies"), from owners of Policies ("Viators") which insure the lives of people who have been diagnosed as having a terminal, catastrophic, and/or life threatening illness ("Insureds"). . . ." Aff. of Jess LaMonda, Ex. A. The investors' money is held in escrow by a Trustee, here ATCO, until a policy or policies are purchased that matches the investors' criteria. Aff. of Jess LaMonda Ex. A. ATCO becomes the beneficiary and owner of the policies and manages the accounts and disburses the funds to facilitate the purchase at the direction of ABC. Aff. of Jess LaMonda, Ex. A.

Phillip Goldberg, the insured, was diagnosed with a life threatening illness, renal failure, and Debtors, owners of the policies, sought to sell the insurance policies for cash. Debtors contacted BA, a broker in the viatical settlement business. BA gathered pertinent information from the Debtors in order for a purchaser to value a life insurance policy and make a bid. BA negotiated a fee and then remitted the bid to the Debtors.

ABC agreed to purchase the two policies. For the Goldberg policy, ABC paid $330,000.00($365,739.14, less $17,502.00 to be placed in escrow for future premiums and less $18,237.14 for repayment of a policy loan). Aff. of Jess LaMonda. BA also received $54,260.85 as a fee in the Goldberg policy transfer. It is disputed as to whether the fee reduced the value the Debtors

received for the policy. According to the affidavit of Jess LaMonda, president of ABC, the viator broker's fees are subtracted from the gross bid. It is disputed as to whether the gross bid would be as high if ABC was not accounting for the broker fee. For the Richmond policy, ABC paid $334,726.52($365,739.14, less $12,322.66 to be placed in escrow for future premiums and less $18,689.96 for repayment of a policy loan). BA received a fee of $51,523.50.

Federal Rule of Bankruptcy Procedure (FRBP) 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure (FRCP). Under FRCP 56, this Court will grant summary judgment only if "...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c). The moving party has the burden of establishing its right of summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See Adickes v. S.H.Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970). The Court has jurisdiction to hear this matter as a core bankruptcy proceeding under 28 U.S.C. §157(b)(2)(F) and 28 U.S.C. §1334.

The Trustee seeks to recover post-petition transfers under §549. In order to determine the §549 issue, I must first look to §550 and Federal Rule of Bankruptcy Procedure (FRBP) 7019, which

incorporates Federal Rule of Civil Procedure (FRCP) 19[3]. According to FRCP 19, a party is necessary if (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may i)as a practical matter impair or impede his ability to protect that interest, or ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. FRCP 19(a).

The sixty-nine investors are not necessary parties. The complete relief sought by the Trustee can be accorded among the

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[3]Federal Rule of Civil Procedure 19(a) states in pertinent part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

present parties. FRCP 19(a)(1) is concerned with whether or not "the court would be unable to fashion an effective decree" and not just "hollow" relief. Mosley v. Meritor Mortgage Corp.-East (In re Mosley), 85 B.R. 942, 946 (Bankr. E.D. Pa. 1988), citing Field v. Volkswagenwerk, A.G., 626 F.2d 293, 301 (3rd Cir. 1980). Under §550(a), the Trustee may recover from the initial transferee or any immediate or mediate transferees. The Trustee is suing ABC, both as an investor and as an agent for the sixty-nine undisclosed investors, and ATCO as initial transferees. The Trustee is suing BA under §549, as a professional person employed without required court approval or application under §327 and §328. The Court can ultimately order the turnover of the insurance policy or award damages from the parties already present if they are found to be transferees under §550. The Court can also disgorge BA's fees without the presence of the investors. To prevail under §550, the Trustee must show that just one of the present parties exercised sufficient dominion and control over the funds transferred. See Nordberg v. Societe Generale (In re Chase & Sanborn Corp.), 848 F.2d 1196, 1200 (11th Cir. 1988); Commercial Recovery, Inc. v. Mill Street, Inc. (In re Mill Street, Inc.), 96 B.R. 268, 269 (9th Cir. B.A.P. 1989)(collection agency was an initial transferee for §550 purposes when it retained a portion of the payment as a fee).

Therefore, FRCP 19(a)(1) is inapplicable.

Under FRCP 19(a)(2), the Court must determine if the absent party claims an interest in the litigation and whether or not that interest would be adequately protected by the present parties. Mosley, 85 B.R. at 947. "Only if the absent parties are not protected should FRCP 19(a)(2)(i) be found applicable." Id. The Trustee is not seeking affirmative relief from the investors as to the §549 issue. The investors do not have an interest in the litigation. This transaction is analogous to a mutual fund whereby the investors' money is pooled together to purchase a life insurance policy or policies or part of a policy just as mutual fund investors' money is pooled together and used to buy various companies' stocks. The viatical settlement purchase agreements state "Whereas ABC is a company whose principal business activity is that of identifying, qualifying and purchasing, as an agent for purchasers, one or more life insurance policies (and relate death benefits), or one or more portions of a life insurance policy or set of life insurance policies ("Policies"), from owners of Policies ("Viators") which insure the lives of people who have been diagnosed as having a terminal, catastrophic, and/or life threatening illness ("Insureds"). . . ." An investor in a mutual fund is not a necessary party to a suit any time a company in which the mutual

fund has an interest is sued and the value of their investment is or might be affected thereby. See e.g., Hartford Fire Ins. Co. v. Leader Constr. Co., 176 F.R.D. 202, 204 (E.D.N.C. 1997)(child did not have an interest which necessitated joinder in action involving alleged fraudulent conveyances where only transfers impacting child involved transfers of property to trust of which she was a beneficiary and corporation of which she was shareholder, where both trustee and corporation already were named defendants in the case); Kauffman v. Dreyfus Fund Inc., 434 F.2d 727, 737 (3d Cir. 1970) cert. denied, 401 U.S. 974, 915 S.Ct. 1190, 28 L.Ed.2d 323 (1971) (stockholder of corporation does not acquire standing to maintain action in his own right, as a stockholder, when the only injury to the stockholder is the indirect harm which consists in the diminution in value of his corporate shares resulting from the impairment of corporate assets). If the investors are merely third party beneficiaries again they are not necessary to the litigation. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1046 (Ct. App. Cal. 1983)(government not a necessary party to a contract dispute between parties who entered into agreements upon request of the government); Wright, Miller, & Kane, 7 Federal Practice and Procedure Civil 3d §1613 (2001)(argument that third-party beneficiaries need to be joined in a dispute between the original

parties has not been successful).

Assuming arguendo that the investors have an interest in the litigation, they are adequately protected by the present parties defending in the §549 issue. ABC, ATCO, and BA have the same incentive as the investors to defend against the §549 summary judgment motion. Particularly, the Trustee alleges that ABC was also an investor. Furthermore, the §549 action would not bind the investors as res judicata, as they are not a party to the action. See In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001).

The determination of the §549 issue would not leave any persons already parties subject to a substantial risk of incurring double, multiple, or inconsistent obligations. Section 550(d) states that "the trustee is entitled to only a single satisfaction" of his claim. 11 U.S.C. §550(d). If the Trustee prevails and recovers from one of the Defendants, he could not turn to the other Defendants or the investors for recovery. Therefore, the sixty-nine investors are not necessary parties. Having determined the sixty-nine investors are not necessary parties, there is no need to engage in a Rule 19(b) analysis. English v. Sealand Coast Line R.R. Co., 465 F.2d 43, 48 (5th Cir. 1972). The Trustee's motion to add indispensable parties is denied and the Defendants' motions to dismiss are also denied.

I now turn to the determination of whether the Trustee is entitled to summary judgement as to the §549 claim. The elements under §549 to be determined are as follows:

1) Whether a transfer of property occurred;

2) Whether the property was property of the estate;

3) Whether the transfer occurred after the commencement of the case;

4) Whether the transfer was authorized by the Court or the Bankruptcy Code.

Drake v. Ambassador Factors (In re Topgallant Lines, Inc.), Chapter 7 Case No. 89-41996, Adv. Proceeding No. 91-4043 (Bank. S.D. Ga. 1993)(Davis, J.).

There is not any real dispute as to whether §549 has been violated. A transfer of property has occurred as evidenced by the contract and subsequent assignment of the policies from Goldberg Brothers and Richmond Recycling to ABC. The policies were property of the estate as they belonged to the Debtors before the commencement of the case. The Goldberg policy was issued on September 12, 1990 and the Richmond policy was issued on December 5, 1995. Affidavit of Klosinski. The bankruptcy case was commenced on October 28, 1997. The transfer of the Goldberg policy occurred on November 15, 1997 and the transfer of the Richmond policy occurred on January 23, 1998. The contract was completed by subsequent wire

transfers. The transfers occurred after the commencement of the case.

Lastly, the transfers were not authorized by the Court or the Bankruptcy Code. There is no Court order that approves the sale of the policies, nor is there a defense available under the Bankruptcy Code. The good faith defense in §549 asserted by Defendants only applies to the sale of real property. The second defense asserted must also fail as the selling of insurance policies by a scrap metal business is not in the "ordinary course of business" under 11 U.S.C. §363 for which court approval would not be required. Therefore, the Trustee is entitled to partial summary judgment as to the §549 issue as against ABC and ATCO.

BA seeks a determination on motion for summary judgment that it did not receive any property of the estate and that the fee received by BA was paid for by ABC for services BA rendered to ABC and not the Debtors. The Trustee is seeking to recover from BA as a professional person employed by the Debtors to perform a service without Court approval.

The Trustee argues that a fiduciary relationship was created between the Debtors and BA where BA acted as an agent for the Debtors. The cover letter from BA to Alex Goldberg states that they represent seriously ill people and that they will seek to obtain the best price for their client, the viator, here the Debtors. The

Trustee further shows that BA's fees were not disclosed to the Debtors and that BA negotiated its fee with ABC, which in turn decreased the amount paid to the Debtors. Trustee supports these allegations with two exhibits in which BA's broker fees for the Goldberg policy are negotiated upwards from $30,000.00 to $54,260.86. Dep. of Bryan Freeman Plaintiff's exhibits 17 & 18. The amount to be paid to the Debtors was decreased from $354,260.86 to $315,880.11.

In its motion for summary judgment, BA argues that it did not receive any property of the estate as it did not receive the actual insurance policies. However, the Trustee is not seeking to recover under the policies but is seeking to disgorge the fees paid as BA failed to comply with 11 U.S.C. §327 & §328. It is not necessary for BA to have received the actual policies to be held liable under §549. As the Court in In re 31-33 Corp., 100 B.R. 744, 747 (Bankr. E.D. Pa. 1989) states:

> The powers of the trustee to avoid post-petition transfers under §549 are broad and admit of only the narrowest exceptions. See, *e.g.*, 4 COLLIER, supra, ¶¶ 549.02, at 549-6 to 549-8. The term "transfer" is broadly construed under the Code in §549 as elsewhere, see In re Rose, 25 B.R. 744, 746 (E.D. Mo. 1982), and payments to professionals for fees

> are clearly among the transfers avoidable under this Code section.

In re 31-33 Corp., 100 B.R. at 747. BA avers that it worked for ABC and not the Debtors and that the fees were paid separately by ABC independent of the Debtors. BA claims the fee is paid based on a percentage of the face amount of the insurance policy being purchased. However, as set forth above, the Trustee has established a sufficient dispute of material facts as to how much ABC actually paid for the policies, whom BA worked for and whether a fiduciary relationship existed between BA and the Debtors.[4] BA is not entitled to judgment as a matter of law. BA's summary judgment motion is denied.

Therefore, the Trustee's motion for partial summary judgment is ORDERED GRANTED against Accelerated Benefits Corporation and American Title Company of Orlando finding a post petition voidable transfer to them under 11 U.S.C. §549(a). The Trustee's motion to add indispensable parties is ORDERED DENIED. Accelerated Benefits Corporation's, Benefits America, N.A., Inc.'s, and American Title Company of Orlando's Motions to Dismiss are ORDERED DENIED. It is

[4]Failure to receive prior court approval under §327 does not lead to a per se disgorgement of the professional's fees as the Court has the power to enter retroactive orders approving an application for retention and compensation. Moore v. Jankowski (In re Diamond Mfg. Co., Inc., Chapter 7 Case No. 85-40555 (Bankr. S.D. Ga. November 2, 1990)(Dalis, J.).

further ORDERED that Benefits America, N.A., Inc.'s motion for summary judgment is DENIED.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 12th Day of September, 2001.